STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2014
v	No. 313450 Wayne Circuit Court
GLENN MALCOLN ARNOLD, Defendant-Appellant.	LC No. 09-031524-FC

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.24f, and felony-firearm, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 30 to 45 years' imprisonment for the assault and felon-in-possession convictions and five years' imprisonment for the felony-firearm conviction. Because defendant was not denied a fair trial by the prosecutor's remarks and because the trial court did not err in failing to provide the "missing witness" instruction, we affirm.

On November 16, 2008, complainant Tarynce Mason was walking along a street in Detroit when he came across Dale Glen. As Mason approached Glen, he saw Glen starting to "back[] up like somebody was behind me." When Mason turned around to look, he saw defendant running toward him shooting a gun. Mason was shot and fell down. According to Mason, defendant then stood over him and shot several more times, striking Mason in the hand, upper leg, and head above the left eye, resulting in loss of vision in that eye.

Woodrow Davis was working as a security guard at a nearby church at the time of the shooting. Davis was listed on the prosecution's witness list, but he never appeared at trial. The trial court found that the prosecution exercised due diligence in attempting to locate Davis and

removed him from the witness list. When instructing the jury, the trial court did not provide the missing witness instruction, CJI2d 5.12,[1] to the jury.

Defendant appeals from his convictions.

I. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor engaged in misconduct when he made statements to the jury that were inflammatory. In order to preserve a prosecutorial misconduct issue, a defendant must either contemporaneously object or request a curative instruction. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Here, defendant did neither.

Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). However, unpreserved claims are reviewed for plain error, which means that defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Thus, in a prosecutorial misconduct context, reversal is necessary only if a timely instruction would have been inadequate to cure any defect. *Ackerman*, 257 Mich App at 449.

On appeal, defendant argues that the prosecutor made improper remarks during opening statements. As long as a prosecutor does not offer his personal belief of a defendant's guilt, a prosecutor can summarize what he thinks the evidence will show. *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). Here, defendant takes exception to the prosecutor stating, "The reason Mr. Mason didn't want to come to court, and he'll tell you this, because he was scared of [defendant], and he was scared of the people who were associated with [defendant]." Defendant notes that Mason provided a different reason for not coming to court – that he simply was not aware that the case was scheduled for trial previously. However, a prosecutor's good-faith opening statement that is later not substantiated by the evidence is not ground for reversal absent any prejudice to defendant. *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). In our review, we do not find that defendant suffered any prejudice by the prosecutor's statement. The fact that the opening statement was so directly contradicted by Mason, himself, makes it unlikely that the jury put any credence into the prosecutor's statement.

Defendant next argues that the prosecutor engaged in misconduct when he stated during closing arguments, "Mr. Mason displayed a great deal of courage in testifying and identifying here in open court his assailant." Defendant relies on Michigan's rules of evidence in making

[1] CJI2d 5.12 provides the following: "*[State name of witness]* is a missing witness whose appearance was the responsibility of the prosecution. You may infer that his witness's testimony would have been unfavorable to the prosecution's case."

this statement "inadmissible." However, as the jury was properly instructed, a prosecutor's statements are not evidence; thus, the rules of evidence are not applicable. Attorneys during closing arguments are allowed to argue the evidence and make reasonable inferences to support their case. *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995). Here, the prosecutor merely asked the jury to consider the circumstances of the victim's testimony as indicative of a lack of a substantial motive for the victim to lie. This was not improper. See *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

In sum, neither remark denied defendant a fair trial. Further, to the extent that any error existed, it could have been cured by a timely instruction. Thus, defendant is not entitled to any relief on these unpreserved issues. *Ackerman*, 257 Mich App at 449.

II. FAILURE TO PRODUCE ENDORSED WITNESS

Defendant next argues that he is entitled to a new trial because the trial court failed to provide the missing witness instruction when the prosecution failed to produce one of its endorsed witnesses for trial. We review a trial court's determination regarding the appropriateness of a missing witness instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). Absent clear error, a finding regarding due diligence in producing a witness is a factual finding that will not be set aside on appeal. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made. *People v McSwain*, 259 Mich App 654, 682; 676 NW2d 236 (2003).

Under MCL 767.40a, the prosecution must notify a defendant of all known res gestae witnesses and all witnesses that the prosecution intends to produce at trial. *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005). "A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial."[2] *Eccles*, 260 Mich App at 388. But "[t]he inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). If, however, the trial court finds a lack of due diligence, then it may be appropriate to provide the jury with the CJI2d 5.12 "missing witness" instruction, where the jury is instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. *Eccles*, 260 Mich App at 388. "The test is one of reasonableness and depends upon the facts of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

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[2] We note that the prosecution incorrectly asserts that this due diligence requirement did not survive the statute's 1986 amendment. That amendment merely "eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be res gestae witnesses." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). That is different from the requirement of using due diligence to produce witnesses *that the prosecution has endorsed*. See, e.g., *Cook*, 266 Mich App at 293 n 4, 295; *Eccles*, 260 Mich App at 388.

At the second day of trial, the prosecution informed the trial court that it was unable to produce one of its endorsed witnesses, Woodrow Davis. The trial court took testimony from Davis's cousin, who testified that she had lived with Davis for the last couple years. But about two weeks earlier, Davis had moved out because he had not paid his share of the rent. The cousin explained that she did not have a phone number for Davis, had no idea where he was, and had attempted to locate him through the church that he used to attend but was unsuccessful. She also noted that Officer Scott Shea had been over to her house several times looking for Davis. Shea admitted that he had a subpoena for Davis, but he was never able to serve it on Davis after looking for him over the last couple or few months. Shea testified that he had made "numerous attempts" to contact Davis using the phone number he had for him but was unsuccessful. Shea also stated that, in addition to visiting Davis's and his cousin's house on "numerous occasions," he contacted the Michigan Department of Agriculture multiple times in order to try to track Davis down through the use of funds that Davis had available to him.[3] However, that attempt also was unsuccessful because Davis had not accessed those funds in over a year. Additionally, Shea conducted CRISNET narrative searches and searched the Michigan Department of Corrections records, Detroit Police Department databases, Michigan jails, hospitals, and morgues for any sign of Davis. Again, all of these inquiries came up empty. The trial court found that the state did not act in a dilatory fashion and struck Davis from the witness list for good cause.

In reviewing the numerous steps that Officer Shea took to locate and contact Davis, we are not left with a definite and firm conviction that the trial court made a mistake in its determination. First, we note that defendant's assertion that Shea did not attempt to locate Davis until less than two weeks before trial is contradicted by Shea's testimony, where he acknowledged that he had been trying "over the past few months" to contact Davis. Second, the evidence showed that, during this time, Shea took many divergent tacks in attempting to locate Davis. These attempts demonstrate that "good-faith efforts were made to procure the testimony." *Bean*, 457 Mich at 684. The fact that other, more stringent efforts may have yielded different results is not dispositive. *Id.* Accordingly, the trial court did not abuse its discretion when it failed to provide the missing witness instruction. *Eccles*, 260 Mich App at 388. Moreover, defense counsel expressed satisfaction with the provided jury instructions. "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a wavier." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). As a result, any error in the jury instructions was extinguished. *Id.*, citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

[3] Shea noted that this method of tracking Department of Agriculture funds worked in locating another witness for trial.